IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1603

HAROLD J. CARDWELL, Warden,
Ohio Penitentiary,

Petitioner,

v.

ARTHUR BEN LEWIS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S BRIEF

WILLIAM J. BROWN,
Attorney General of the State of Ohio

LEO J. CONWAY,
NICHOLAS R. CURCI,
Assistant Attorneys General

JEFFREY L. MCCLELLAND
48 E. Gay Street, Room No. 202,
Columbus, Ohio 43215,
Attorneys for Petitioner

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1603

HAROLD J. CARDWELL, Warden,
Ohio Penitentiary,

Petitioner,

v.

ARTHUR BEN LEWIS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S BRIEF

Opinions Below

The opinion of the United States Court of Appeals for the Sixth Circuit entitled *Arthur Ben Lewis* v *Harold J. Cardwell, Warden,* No. 72-1679, is set forth as Appendix A to the Petition for Writ of Certiorari at page 27 thereof.

The prior opinion of the United States District Court for the Southern District of Ohio, Eastern Division entitled *Arthur Ben Lewis, Jr.* v *Harold J. Cardwell, Warden,* Civil Action 71-76, is set forth as Appendix B to the Petition for Writ of Certiorari at page 35 thereof.

Jurisdiction

The opinion of the United States Court of Appeals was filed on April 5, 1973. The Petition for Writ of Certiorari was filed in typewritten form on June 1, 1973 and in printed form on or about November 3, 1973 and Certi-

orari was granted December 3, 1973. The jurisdiction of this Court derives from 28 U.S.C. Section 1254(1).

Questions Presented

1. Whether, after a state trial court judge has, following a full *voir dire* hearing, found the objected to evidence to have been legally seized, which finding was supported by the record, the United States District Court should ignore this finding and conduct a separate evidentiary hearing.

2. Whether, after an acknowledged valid arrest, respondent voluntarily displayed to the arresting officers a parking lot ticket and the keys to his automobile which they believed to have been used by him in the perpetration of the crime for which he was arrested and these articles were turned over to the arresting officers either voluntarily or involuntarily, a seizure incident to a lawful arrest was consumated.

3. Whether, after a valid seizure of a parking ticket and keys to an automobile which the arresting officers had good reason to believe had been used in the commission of a crime for which respondent was arrested, which automobile was parked at a nearby public parking lot, it was illegal to remove the automobile to the police pound for examination by technical experts.

4. Whether, after an automobile has been seized incident to a lawful arrest, and is in the sole possession of the police, it is necessary to procure a search warrant in order to examine the car for tire and paint comparison.

Constitutional Provisions Involved

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause,

supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment XIV, section 1, in relevant part:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. History of the Case

On November 8, 1967, the Delaware County Grand Jury returned an indictment charging respondent with murder in the first degree in violation of §2901.01, Ohio Revised Code. He was tried before a jury on March 4-21, 1968, and found guilty with the recommendation of mercy. On March 29, 1968, he was sentenced to a term of life imprisonment in the Ohio Penitentiary.

Prior to trial several defense motions were made and decided. One, a motion to suppress evidence, was heard by the trial court on January 25, 1968 (4A) and overruled in a written opinion and order dated February 20, 1968 (19A). The subject of this motion was the seizure and examination of respondent's automobile.

Respondent appealed his case directly to the Fifth District Court of Appeals for Delaware County, Ohio, which affirmed the judgment of conviction on February 6, 1969. Thereafter, respondent appealed to the Supreme Court of Ohio which affirmed his conviction on May 13, 1970. See *State v. Lewis*, 22 O.S.2d 125.

Respondent then filed a Petition for Writ of Certiorari in this Court. Among those questions presented in that petition was the following:

"Were appellant's rights under the Fourth and Fifth Amendments abridged where appellant's automobile, parked on a private lot one-half block from site of appellant's arrest, was seized and searched without legal process of any kind—even though appellant had been out of the automobile for over eight hours—and where the fruits obtained by such search were received in evidence at appellant's trial in the state court?"

This Court denied the Petition for Writ of Certiorari. See: *Lewis v. Ohio,* 400 U.S. 959 (1970).

In April of 1971, respondent filed a petition for the writ of habeas corpus in the United States District Court for the Southern District of Ohio, Eastern Division.

In this petition the following question, among others, was raised:

"The warrantless seizure of his automobile, parked on a private lot one-half block from site of his arrest, for purpose of ascertaining as to whether said automobile had been an instrumentality of the crime, violated Fourth Amendment prohibition where such seizure was justified only after the seizure; (in theory of the State's case), further, the automobile was not seized contemporaneous in time and place with petitioner's arrest, and evidence seized therefrom served as a basis of his conviction." (P. 37, Appendix B to petition)

The only other issue which had been submitted to the Supreme Court of Ohio dealt with the use of hearsay evidence by the State.

Following the filing of a Return of Writ and appointment of counsel, an evidentiary hearing was held on April 20, 1972.

Thereafter, on May 19, 1972, the court issued an Opinion and Order finding nine of the ten issues to be without merit. (Page 35, Appendix B to Petition). However, as to issue five, the court found that respondent had been

denied due process of law and ordered "that the writ of habeas corpus issue ninety days after the filing of this Opinion and Order, and that petitioner be released from custody, unless within such ninety day period State officials initiate action for a new trial of petitioner. If State officials initiate action for a new trial, it is ORDERED (sic) that no writ of habeas corpus shall issue."

Petitioner then filed a timely notice of appeal and obtained a stay of execution. Oral argument was heard cuit on December 8, 1972 and on April 5, 1973, the court of appeals issued its decision affirming the opinion of the district court. (Page 27, Appendix A to petition). It is from this judgment of the court of appeals which petitioner seeks this writ of certiorari.

B. Statement of Facts

At the trial of respondent, one Steven Molnar, Jr., a laboratory technician and firearms examiner for the Ohio State Bureau of Criminal Identification and Investigation, testified for the State. He testified that he took paint scrapings from respondent's car while it was at the Columbus police impounding lot. He also said that he had paint scrapings which had been taken from the murder victim's car, which, it was thought, was pushed over the river bank at the scene of the crime, by another car. This examination occurred on October 11, 1967, and the paint was taken from the right rear and the left front of respondent's car, and from the right rear fender and the right side of the rear fender of the victim's car for purposes of comparison. He went on to testify that, in his opinion, there was

> ". . . no difference in color, texture, or order of layering of the paint samples that I was comparing." (Bill of Exceptions, p. 221)

Furthermore, the color of paint was the same.

The paint samples from respondent's car and testimony were admitted over objection.

There was, however, a pre-trial hearing on a motion to suppress filed by respondent. The motion concerned the evidence and testimony referred to above. The hearing was held in the trial court on January 25, 1968. Testifying were Clyde Mann, then Chief Investigator for the Division of Criminal Activities of the Attorney General of Ohio, David Tingley, Attorney at Law, and Sgt. William Lavery, of the Delaware County, Ohio, Sheriff's Office.

Facts adduced at this hearing were as follows:

Respondent was interrogated in the office of the Attorney General, 40 S. Third Street, Columbus, Ohio, on October 10, 1967, pursuant to a request to come to the office. He was served with an arrest warrant and placed under arrest late in the afternoon, after which his car was impounded by the Columbus, Ohio, Police Department.

Mr. Mann testified at the hearing that present during the interrogation of respondent of October 10, 1967, in the Attorney General's Office, were Lavery, Jim Heise, David Kessler, Ed James, respondent and himself. He said that he told respondent, after he was arrested, that he, Mann, was going to impound respondent's car because it was used in a felony, and that he had no warrant. On direct examination, Mr. Mann revealed that respondent asked him to have his car impounded or put in a police lot for safekeeping (10A).

Next to testify was David E. Tingley, Attorney at Law, who testified that he witnessed the facts surrounding the seizure of the automobile. He testified that at about 5:30 p.m. on October 10th, respondent was in custody and

that Clyde Mann indicated to Mr. Scott that he wanted possession of some books and records respondent brought with him as well as the automobile, because it was used in the commission of a felony. Scott then, according to Mr. Tingley, said that he would not enter into a physical fight over the car and gave the keys to Mann. He then got the parking ticket from respondent and gave it to Mann.

Next to testify was Sergeant William Lavery. He stated that he obtained a warrant for respondent's arrest on the morning of October 10, 1967. Furthermore, he stated that he requested Mr. Mann to have the automobile impounded but that, according to his recolletion, respondent had asked the officers to watch the car as he was concerned about it.

The trial court made the following finding:

> "In this Court's opinion the seizure of this car was incident to a lawful arrest. In this Court's opinion the subsequent search of this car was a reasonable search of a legally impounded vehicle and was incidental to the crime for which the Defendant was, arrested." (26A).

At the evidentiary hearing of April 20, 1972, in the district court the testimony relative to the seizure and search of the automobile elicited the following: Paul Scott, defense counsel at the trial, testified that respondent gave him the keys to his car shortly before or subsequent to his being arrested, with instructions to return the automobile to his (respondent's) family. He also gave Scott the parking lot claim ticket. Furthermore, after Scott's arrival at the Attorney General's Office and after a conference with respondent, the arrest warrant was served on respondent. After that, according to Scott, Clyde Mann confronted Scott and demanded respondent's briefcase and automobile. Rather than get into a physical

confrontation with Mann, Scott relinquished the keys and the claim check to Mann with the admonition that he would see Mann in court on a motion to suppress.

On cross-examination, Mr. Scott testified that, although there was no real threat from Mann, he did not willfully turn the automobile over to Mann, that it was done under protest, subject to what would happen in a court of law. His exact words were "Well Mr. Mann, I am not going to have a physical confrontation with you for that automobile. Here is the key. Here is the ticket, and I will see you in court on a motion to suppress on that." (49A). ". . . [T]here was no threat." (52A). He acknowledged that he did not give up the briefcase. (52A). Mr. Scott did not question the validity of the arrest (50A). He did not testify at the trial court hearing on the motion to suppress.

Sergeant Lavery testified for the respondent. He stated that, prior to the actual seizure of the car, he did know the description of respondent's car, that on the day of the seizure he had no search warrant, and that respondent asked that his car be taken care of (56A). The Columbus police actually towed the car.

On cross-examination, he stated that he believed the request by respondent that his car be taken care of was made about 5:00, while Mr. Scott was present. He further said that, in his opinion, respondent's request was a general request made of no one in particular. He could recall no discussion between Scott and Mann relative to the car (59A). He also stated that he did not know that respondent's car was parked on the lot south of the Attorney General's Office (62A).

In answer to questions by the district judge, Sergeant Lavery testified:

THE COURT: "You also testified that Mr. Lewis took

the parking lot ticket out of his pocket and asked if either you or Mr. Mann—you weren't sure which—could take care of this automobile since you were going to take him back?"

THE WITNESS: "Yes, sir, that is correct." (60A)

* * * * * * * * *

THE COURT: "Sometime between 4:00 o'clock and the time that the conference terminated, you took Arthur Ben Lewis back to Delaware; that Clyde Mann demanded Mr. Scott that he, Mr. Scott, turn over the keys to Mr. Lewis's car and the ticket to Mr. Lewis's car. Do you recall that Mr. Mann demanded that Mr. Scott turn over the ticket and the keys to Mr .Lewis's car?"

THE WITNESS: "No, sir, that isn't correct at all because I recall precisely Mr. Lewis removing the parking ticket and asking if some one of us would take care of his car. I don't recall the keys." (61A).

Respondent himself was next to testify on the issue of illegal search and seizure at the evidentiary hearing. He testified that he drove to the attorney general's office and parked on a parking lot near that office. He also denied that he asked anyone from the attorney general's office to remove his car saying that he gave his keys and claim check to Paul Scott before he was arrested so that Scott could take the car home for respondent's family's use. Furthermore, he testified that the police officers did have a description of his car (64-65A).

Clyde Mann was the first witness for petitioner to testify relative to the search and seizure issue. He testified again that respondent requested Mr. Mann to take care of his car and claim ticket. Furthermore, this occurred at approximately 5:00 p.m., on October 10, 1967, in the hallway inside the attorney general's office and that, to the best of his knowledge, the claim check was

handed directly to him by respondent. This confrontation apparently occurred close in time to Mr. Mann's request of Scott for possession of respondent's briefcase (73A). Mr. Mann also again testified that he believed the car was used in the commission of the crime and for this reason wanted the car (74A).

Sergeant Lavery was called by petitioner as his witness and testified on direct examination. He testified as to facts he had in his possession on October 10, 1967, relative to respondent's involvement in the crime and the role his automobile played in the commission thereof (76-79A).

Summary of Argument

Arresting officers, in possession of a valid arrest warrant, inadvertently discovered that respondent's automobile, which they sought as evidence in the crime for which he had been arrested, was parked at a nearby public parking lot when respondent produced the parking ticket in their presence and disclosed its location. The police took the parking ticket, recovered the automobile and removed it to the police pound where the following day it was examined. Tire casts were made and paint scrapings were taken for comparison with foreign paint taken from the victim's automobile which had been pushed over a river bank by his murderer.

Prior to trial a motion to suppress the paint sample was made and heard. The trial court, after a *voir dire* hearing, in a well reasoned opinion found that the officers had legally seized the parking ticket incident to the arrest, that this constituted constructive possession of the automobile, and that the subsequent removal and examination of the automobile was made incident to a lawful arrest and upon probable cause.

This finding was clearly supported by the record and

could not be considered to have been erroneous. In addition, the Supreme Court of Ohio, on direct appeal, had found that the record supported the trial court's finding that the car had been seized incident to a lawful arrest and examined as an instrumentality of the crime. *State v. Lewis, supra.* This Court had denied certiorari. *Lewis v. Ohio, supra.* The finding of the Ohio courts should have been accepted by the federal district court in a subsequent habeas corpus action. *La Vallee v. Rose* __ U.S. __, 35 L.Ed. 2d 637 (1973).

In the habeas corpus petition respondent contended that his automobile had been illegally seized and that the paint scrapings and the comparison testimony was improperly admitted in evidence. The district court conducted an evidentiary hearing wherein the evidence elicited did not vary materially from that in the state trial court. One difference, however, did develop. Respondent testified that he gave the parking ticket to his attorney in the presence of the officers with instructions to recover the automobile and deliver it to his family. This was corroborated by the testimony of his trial attorney, Paul Scott. Neither had testified in the trial court hearing on the motion to suppress. This supported the belief of the officers that if the car was to be moved they might never thereafter find it.

The district court refused to find, as had the trial court, that the seizure of the parking ticket was not tantamount to a seizure of the car incident to a lawful arrest, that there were no exigent circumstances for its seizure, and that since the arresting officers knew that they wanted to seize the automobile they should have procured a search warrant for it. The court erroneously relied on the decision of this Court in *Coolidge v. New Hampshire,* 403 U.S. 443 (1971) for its finding. *Coolidge* was not decided

until over three years after the officers had seized respondent's automobile and the trial court had ruled upon the motion to suppress.

The United States Court of Appeals for the Sixth Circuit followed the reasoning of the district court and affirmed its decision on appeal.

This is not a *Coolidge* case. Although the officers intended to seize respondent's car, they could not have procured a search warrant therefor until they knew its location, and this knowledge came about only after his arrest. Moreover, there were exigent reasons for them to seize the car when and where they did. Otherwise they should have had to place a guard on it until a search warrant could be procured which, in effect, would have produced the same intrusion on the rights of respondent as would the seizure itself. *Chambers v. Maroney*, 399 U.S. 42 (1970).

Argument

The United States Court Of Appeals Erred In Affirming The Decision Of The United States District Court That Paint Samples Taken From Respondent's Automobile Which Had Been Legally Seized As Incident To His Arrest Were Admitted In Evidence At Respondent's Trial In Violation Of His Rights Under The Fourth And Fourteenth Amendments To The Constitution.

The United States District Court authored a lengthy analysis of the allegation that admission of certain paint scrapings at trial against respondent was violative of the Fourth and Fourteenth Amendments. The court concluded that the evidence was not seized as incident to a valid arrest, that respondent did not consent to its seizure, and that the search was not justified as having been seized in "plain view." The court of appeals indicated it was in "full agreement" with this opinion. Petitioner submits

such a conclusion was erroneous. The parking ticket for the car was seized incident to the arrest. The car then was taken by presenting the parking ticket to the parking lot operator and was moved to the police pound where the next morning it was examined.

Petitioner initially notes that the evidence complained of by respondent in the courts below was paint scrapings taken from the exterior surface of his car while it was in the Columbus, Ohio, police impounding lot. No evidence was admitted as a result of any intrusion to the car's interior.

Petitioner contends, therefore, that such paint scrapings were properly admitted against respondent at trial as such scrapings were the result of a scientific examination of an instrumentality of the crime for which respondent was arrested. Cf: *Cotton v. United States,* 371 F. 2d 385 (9th Cir., 1967); *United States v. Graham,* 391 F. 2d 439 (6th Cir., 1968), wherein it is stated at page 442:

> "While it is true that the Constitutional proscription against unreasonable searches and seizures extends to automobiles, since they, like houses, legitimately serve as repositories for personal effects and belongings of the owners and occupants, this is immaterial to the question presented at bar. No articles of evidence separate from and independent of the cars themselves were obtained as a result of the police examination, as was true in such cases as *Preston v. United States,* 376 U.S. 364, 84 S. Ct. 881, 11 L. Ed. 2d 777 (1964), and Cooper v. State of California, 386 U.S. 58, 87 S. Ct. 788, 17 L. Ed. 2d 730 ((1967)."

See also: *United States v. Ware,* 457 F.2d 828 (7th Cir., 1972); *United States v. Johnson,* 413 F.2d 1396 (5ht Cir., 1969).

But assuming that this examination did constitute a search within Fourth Amendment contemplation, which

petitioner does not concede, such was valid as

> ". . . . the search of the car - - - whether the state had legal title to it or not - - - was closely related to the reason petitioner was arrested, the reason his car had been impounded, and the reason it was being retained." *Cooper v. California*, 386 U.S. 58 (1967).

The record clearly indicates that the inspection of respondent's car was consistent with the reason the car was impounded and with the reason for which respondent was arrested. No intrusion was made to the interior and no general exploratory search for evidence of any kind complained of in the courts below was conducted. The car itself was evidence and the police had complete dominion and control over it. As such, there could be no further trespass committed by a subsequent examination.

Under the circumstances, therefore, it cannot be said that the inspection and examination of the paint samples in question for purposes of identification, which identification was consistent with the reason the car was seized, was unreasonable. See, *United States v. Powers*, 439 F.2d 373 (4th Cir., 1971); *United States v. Johnson*, *supra*.

In its simplest form the situation presented here involves the propriety of the examination of a piece of evidence after seizure. The case of *People v. Teale*, 450 P. 2d 564 (Cal., 1969) speaks to this proposition at footnote 10, p. 572:

> "Only an object reasonably believed to be itself evidence of the charged crime is subject to seizure and, therefore, to detailed examination subsequent to seizure."

Respondent's automobile was reasonably believed to have been evidence of the crime itself.

An analogous situation would be where perhaps a gun believed to have been a murder weapon, or blood-stained

clothing believed to have been worn by a suspected offender were in police possession. Can it be doubted that the police have every right to examine such items consistent with the reasons they were seized? Obviously not. Such then, is the instant situation.

As to the seizure of the car, it must first be noted that "automobiles, because of their mobility, may be searched without a warrant upon facts not justifying a warrantless search of a residence or office." *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 221 (1968). See also, *Brinegar v. United States*, 338 U.S. 160 (1959); *Carroll v. United States*, 267 U.S. 132 (1925). Petitioner submits that such a proposition is equally applicable to seizures of automobiles as it is to searches. Accordingly, the seizure of the automobile was necessitated by the exigencies of the situation compounded by the fact that the item or evidence to be seized was a large, readily mobile entity such as an automobile.

Additionally, at the time of the seizure and at the time of the trial, the "relevant test (was) not whether it is reasonable to procure a search warrant, but whether the search was reasonable." See: *United States v. Rabinowitz*, 339 U.S. 56 (1950). Petitioner submits that the actions of the investigating authorities were at all times reasonable and consistent with respondent's Fourth Amendment protections.

1) The Courts Below Erred In Ignoring The Finding Of Fact Made By The Trial Court Following A Full *Voir Dire* Hearing On A Motion To Suppress Which Finding Of Fact Was Clearly Supported By The Record.

Prior to trial defense counsel filed several motions one of which was a motion to suppress evidence seized in and about respondent's Pontiac automobile. The complete proceedings on this motion to suppress appears at

pages 4-19A. At pages 19-27A is the complete opinion of the trial court in overruling the motion. The significant part of his ruling was as follows:

> "A complete record of the testimony and state ment of counsel at the various hearings in this case and the memoranda on file will reveal that the State claims not only that the car was used as a means of transportation to and from the secene of the alleged crime but also that it was used to push the Decedent's automobile. Apparently plaster casts and molds of automobile tire tracks and the results of laboratory tests of samples of car paint are expected to be offered as evidence.
>
> 'Again, the question is 'was the seizure and search of the automobile reasonable under all the facts and circum stances of this case?' In this Court's opinion it was.
>
> 'It appeart so this Court that it was reasonable for law enforcement officers to immediately seize a care which their investigation gave them reasonable cause to believe had been used in the commission of the felony charged. The car was in the possession or constructive possession of the Defendant; he had the key and parking ticket for it. It was on a public parking lot adjacent to the building in which public State offices are located and where the Defendant had just been arrested.
>
> 'This is not a case in which a person's home or private structure has been unreasonably invaded. This is not a case in which an individual's person has been reasonably searched.
>
> 'In this Court's opinion the seizure of this car was incident to a lawful arrest. In this Court's opinion the subsequent search of this care was a reasonable search of a legally impounded vehicle and was incidental to the crime for which the Defendant was arrested." (25-26A).

The trial court based its finding upon the fact that the

seizure of the automobile was incident to respondent's arrest, the legality of which never has been questioned. This was based upon the testimony that the parking ticket, however turned over, was the claim for the car which was parked in the vicinity and thusly constructive possession of the automobile had passed from respondent to the officers by the seizure of the parking ticket. Petitioner submits that the vehicle, by virtue of the parking ticket, then was picked up and removed to the police pound where it was held as evidence in the case until it could be subjected to an examination and tests. It was well known to respondent that the investigating officers believed his car had been used in the perpetration or cover up of the murder and that he had every reason for concealing it.

The district court noted that after hearing the motion to suppress, the trial court made no detailed findings of fact. But the trial court was careful to note:

> "No good purpose would be here served by repeating here all the evidentiary matters, oral and written contentions of counsel and all the legal authorities which were cited. As yet the complete record of the hearing has not been transcribed; it will be available to counsel and any reviewing Court. This Court is of the opinion that, to enable counsel adequate time to prepare for trial, it should not delay filing this ruling until that record is available." (20A)

The transcript referred to by the trial judge was before the district court which then deemed it necessary to conduct an evidentiary hearing of its own. Witnesses Mann and Lavery testified in both the state and district court hearings. The district court noted that this testimony in the two hearings did not differ materially. Paul Scott, who did not testify at the motion to suppress hear-

ing, testified in the district court. This testimony did not vary materially from that of David Tingley at the state court hearing.

The district court also was fully aware that the Supreme Court of Ohio had found the car to have been seized incident to a lawful arrest and examined as an instrumentality of the crime and hence was not an illegal search (p. 52 App. B).[1]

The district court ignored the findings of all Ohio courts and found that the search of the car was not incident to the arrest nor seized as an instrumentality of the crime. It also found that the article seized was not in plain view, was not voluntarily relinquished nor were there any exigent circumstances to eliminate the necessity of a search warrant. The court of appeals adopted the findings of the district court and emphasized that there could have been no "exigent circumstances", and no "instrumentality of the crime" hence the seizure of the car without a warrant was illegal. (pp. 30-32 App. A).

There is no doubt that the trial court attempted in every way to insure respondent's claim of illegal search and seizure was thoroughly heard. It also is clear that its decision was not hastily and casually made but rather was made after a thorough study of the law it believed applicable at the time. This was some three and one half years before *Coolidge v. New Hampshire*, supra, so often referred to by the courts below, was decided. It therefore relied upon *Cooper v California*, supra and *United States v Rabinowitz*, supra, and correctly interpreted the ruling of this court in *Warden v Hayden*, 387 US 294 (1967). It found by whatever means the seizure of the automobile was made it was reasonable under existing authority.

---

1. *State v Lewis* 22 Ohio St 2d 125, 128.

It is petitioner's contention that both the district court and the court of appeals, in arriving at their decisions, applied their interpretations of *Coolidge v. New Hampshire, supra,* retroactively. This Court never has applied any case dealing with the exclusionary rule retroactively. Thus, in *Linkletter v. Walker,* 381 U.S. 618 (1965) it was held that the rule of *Mapp v. Ohio,* 367 U.S. 643 (1961) was to be applied prospectively. See *Fuller v. Alaska,* 393 U.S. 80 (1968), *Desist v. United States,* 394 U.S. 244 (1969).

This Court has recently held in the case of an alleged involuntary confession, which consistently has been considered to go to the very heart of the fact finding process, that a state court's determination of the merits of a factual issue, made after a hearing and evidenced by a written opinion, shall be correct unless it appears that the merits of the factual dispute were not resolved in the state court hearing, where the trial court summarized the evidence, and concluded that the confessions were voluntary.[2] Where, as here, the evidence is relevant and its admission had no bearing on the innocence or guilt of the respondent, it is believed that the rationale of *Lavallee v. Rose, supra* should apply to a motion to suppress evidence. *Linkletter v Walker, supra.*

After the finding of the trial judge a long trial followed which resulted in respondent's conviction. Both the state court of appeals and the Supreme Court of Ohio found no fault with the findings of the trial court and this Court seemingly noted no grievous error when it denied *certiorari. Lewis v Ohio, supra.*

After a careful review of the trial court's findings by the Ohio Appellate Courts and of this Court on direct appeal a collateral attack in federal habeas corpus should

---

[2] *Lavallee v Rose, supra*

not result in a reversal of the state court determination unless it can be found that there was no basis for the trial court's findings. On direct appeal the determinations of the trial court must be upheld unless they are clearly erroneous. This is the generally accepted rule. Although not directly in point, the United States Court of Appeals for the District of Columbia recently stated:

> "The ultimate determination by a trial judge at a suppression hearing as to the issue of consent, whether it be consent to enter or consent to search, is factual in nature. As such, under the guidelines established for this court in Jackson v. United States, 122 U.S. App. D.C. 324, 353 F.2d 862 (1965), that determination must remain untouched on appeal unless it is "clearly erroneous." See Hoover v. Beto, 467 F.2d 516 (5th Cir. 1972); United States v. J. B. Kramer Grocery Co., Inc., 418 F.2d 987 (8th Cir. 1969); Schoepflin v. United States, 391 F.2d 390 (9th Cir. 1968), cert. denied, 393 U.S. 865, 89 S.Ct. 146, 21 L.Ed.2d 133 (1968); Green v. United States, 128 U.S.App.D.C. 408, 389 F.2d 949 (1967); Villano v. United States, 310 F.2d 680 (10th Cir. 1962). A finding is not "clearly erroneous" unless the reviewing court is left with the definite and firm conviction that a mistake has been made—the finding either is not supported by or is clearly against the weight of the evidence, or induced by an erroneous view of the law. United States v. United States Gypsum Co., 333 U.S. 364, 63 S.Ct. 525, 92 L.Ed. 746 (1948." United States v Sheard 473 F2d 139 (D.C. Cir 1973).

Where a federal habeas corpus petitioner has raised the same contentions in his appeal to state courts that he advances in his habeas petition and the state's fact-finding process was full and fair, presumption of correctness should be applied to the state court's findings. Cf: *Hall v Craven*, 325 F. Supp 516 (C.D. Cal., 1971); *Paulson v Florida*, 360 F. Supp 156 (S.D. Fla., 1973); *United States*

ex rel. Griffin v Vincent, 359 F. Supp 1072 (S.D.N.Y. 1973); *Brown v Wisconsin State Department of Public Welfare*, 457 F.2d 257 (7th Cir., 1972); *Leavitt v Howard*, 462 F.2d 992, (1st Cir., 1972). This Court has stated that the finding of facts of a state court should not be ignored by a federal appellate court. *Cady v Dombrowski* ——— US ——— 37 L. Ed 2d 706 (1973). The Supreme Court of Ohio found that the officers had reasonable grounds to believe that the car had been used in the furtherance of the commission of the crime for which respondent was arrested and that it was an instrumentality thereof. This finding was ignored by the court below which brushed off the instrumentality theory on the basis of *Warden v Hayden supra*. In so doing the court of appeals, not the Ohio Supreme Court, misconstrued the holding in that case.

The facts before the state courts were that the car had been used in the commission of the crime and was evidence whether plain or as an instrumentality. The claim check for the car came into view inadvertantly incident to the lawful arrest of respondent and as such was recognized by this Court as an exception in *Coolidge v New Hampshire*, supra at pages 465-466.

2) The Courts Below Erred In Finding That The Arresting Officers Had Not Seized Respondent's Automobile Incident To A Lawful Arrest After The Trial Court Had Made Such A Finding Based Upon Relevant Evidence Before It.

The trial court found that the seizure of respondent's automobile was incident to a lawful arrest. It based this finding upon the fact that at the time of the arrest or immediately thereafter respondent had turned over a claim check to the law enforcement officers. This is not dis-

puted. The car, by virtue of the parking ticket, was in the possession or constructive possession of the respondent and physically was in a public parking lot adjacent to the building wherein the arrest took place. The officers had reasonable grounds to believe the car had been used in the commission of the crime for which respondent had been arrested. Lastly the court found that the car itself then was seized in the parking lot and removed to the police pound where it was searched (21, 25-26 A). The court found that, "The arrest and seizure of the car were in the same general transaction." (26 A). The court based its findings upon the rationale of *Cooper v. California*, supra.

Petitioner submits that the seizure of the claim check constituted the intrusion into respondent's Fourth Amendment protected area, which intrusion was justified as being incident to the valid arrest of respondent. By seizing the claim check at that time, respondent's control and dominion over the car effectively ceased. Quite obviously, without either of these items, the complete use of the automobile by respondent was limited if not impossible. Respondent's "possession" of the car was dependent upon the claim check.

Of equal effect would have been the only other practical alternative available to the investigating authorities at the time; that being to have placed a guard at the car and make it inaccessible to Scott until a warrant could be obtained to remove the car. In either case, an intrusion into respondent's Constitutionally protected domain would have occurred, either of which would have been justified. This Court has spoken to the practice of allowing a "lesser" intrusion to justify a "greater" intrusion of an individual's Fourth Amendment rights:

> "Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car

should be permitted until a search warrant is obtained; arguably, only the 'lesser' intrusion is permissible until the magistrate authorizes the 'greater.' But which is the 'greater' and which the 'lesser' intrusion is itself a debatable question and the answer may depend on a variety of circumstances. *For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.*" *Chambers v. Maroney, supra*, at 51-52 (1970). (Emphasis supplied)

Although the trial court found that the car was seized incident to a lawful arrest which petitioner contends is fully supported by the record it also found that the subsequent search like that in *Cooper* was a reasonable search of a legally impounded vehicle and was incidental to the crime for which respondent was arrested. See also: (Footnote 12, 403 US 457). *Carroll v United States, supra.*

Never does the majority opinion in *Coolidge v New Hampshire, supra* overrule *Cooper*. *Cooper* is distinguished as a case not based upon a search incident to a lawful arrest but rather upon the seizure of an automobile which the officers reasonable believed to have been used in the commission of the crime.

The trial court did not base its approval of the search solely upon a lawful arrest but also upon the other grounds set forth in *Cooper*. See also: *United States v Francolino*, 367 F2d 1013 (2d Cir., 1966); *Orricer v Erickson*, 471 F.2d 1204 (8th Cir., 1972); *United States v Shye*, 473 F.2d 1061 (6th Cir., 1973); *Commonwealth v Smith*, 304 A. 2d 456 (Pa. 1973); *Drummond v United States*, 350 F.2d 983 (8th Cir., 1965); *United States v Cecil*, 457 F.2d 1178 (8th Cir., 1972); *United States v Gulledge*, 469

F.2d 713 (5th Cir., 1972); *Smith v Slayton*, 484 F.2d 1188 (4th Cir., 1973); *Thompson v United States* 484 F.2d 942 (6th Cir., 1973).

3) The Courts Below Erred In Finding That It Was Illegal To Remove An Automobile From A Nearby Public Parking Lot To The Police Pound Ffor Examition By Technical Experts When It Was Removed After A Valid Seizure Of A Parking Ticket To The Automobile By The Arresting Officers Who Had Good Reason To Believe It To Have Been Used In The Commission Of A Crime For Which Respondent Was Arrested.

The arresting officers believed, and had good reason to believe, that respondent's automobile had been used to push the victim's automobile over a river bank. In so doing the rear of the victim's car had been damaged and flecks of foreign paint were deposited thereon. This paint was removed and samples were taken and forwarded to the F.B.I. laboratory. Based upon the FBI report it was learned that the paint could have come from a gold colored 1966 Pontiac, the same as that of respondent. Investigation disclosed that respondent's 1966 Pontiac had been taken to a body shop shortly after the murder for front end repairs. The officers, therefore, considered the Pontiac automobile to be valid evidence to be used in the proof of the commission of the crime. The location of the car became known to the officers at the time of arrest. Even though the car was not under the direct control of respondent in the attorney general's office the claim check was turned over to the officers who then had constructive possession of the car (76-79A).

The officers were interested primarily in two areas, the color and texture of the paint of the car and the make and pattern of the front tires. This examination of the car

could not be done properly on a busy parking lot and was removed to the police pound where the inspection was completed.

It is petitioner's contention that the police had a right to inspect the car on the spot and that, therefore, they had a right to have it removed to the pound for processing. Cf: *Carlton v Estelle* 480 F2d 759 (5th Cir., 1973)

At the outset, although this argument was not accepted by the courts below, petitioner contends that where respondent produced the parking ticket after his arrest, it was in plain view of the officers. He indicated that it was a parking ticket for the car and the officers wanted the car. They therefore took constructive possession of the car at that time and deprived respondent or his agents of the ability to take it. It is emphasized that the evidence in plain view was pertinent to the crime alleged and was not seized as a result of an exploratory search. It therefore was admissable under the "plain view" doctrine. Cf: *Harris v United States*, 390 US 234, 236 (1968); *United States v Sheard*, supra; *United States v Bright*, 471 F2d 723 (5th Cir., 1973); *United States v Candella*, 469 F.2d 173 (2d Cir., 1972); *United States v Cecil, supra.*

The court below refused to accept the "plain view" theory for the reason that there were no exigent circumstances to seize the automobile without a warrant. This, of course, is a completely erroneous finding. Both respondent and his attorney Paul Scott testified in the district court evidentiary hearing that respondent wanted Scott to get the car and take it to his family. If this had been done the automobile, as did the brief case which was not seized and was not subsequently available to the police, pending the procurement of a search warrant, could have disappeared and never been found (48-49, 64-65 A). Had a guard been placed over the car to prevent its removal pending the procurement of a search

warrant respondent would have been in the same relative position with respect to the inspection of the car as he was under the immediate seizure. This Court in *Chambers v Maroney, supra,* stated as page 51-52:

> "Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the "lesser" intrusion is permissible until the magistrate authorizes the "greater." But which is the "greater" and which the "lesser" intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment."

See also: *United States v Bozada* 473 F.2d 389 (8th Cir., 1973) *cert. denied* 93 S Ct 2161; *United States v Walen* 479 F.2d 467 (3rd Cir 1973).

Petitioner contends and earnestly believes that the seizure of the car at that time was necessitated as the authorities had reason to believe that a very valuable piece of evidence was likely to be moved or destroyed. The record bears out their fears. During the interrogation session of October 10, 1967, in the attorney general's office, respondent was made acutely aware of how the authorities felt the car figured into the crime and what part of the car was thought to have been used. There was no reason to think that respondent could not have contacted someone, friends or family, with instructions to dispose of the car or conceal it from the authorities. While the courts below could find no facts to justify the seizure on the basis of exigency petitioner believes that the facts, as set out above, which constituted a very real

prospect of concealed evidence, necessitated the seizure of the car in the manner and method, that it was seized and at the time it was seized.

The facts, which are largely uncontradicted, are ignored by the courts below yet were apparently given much consideration by the trial court, who was in the best position to make the most valid judgment. The courts below are clearly in error. *Cf. LaVallee v. Rose, supra.*

4) The Courts Below Erroneously Held That After An Automobile Had Been Seized Incident To A Lawful Arrest And Was In The Sole Possession Of The Police That It Was Necesasry To Procure A Search Warrant In Order To Examine The Car For Tire And Paint Comparison.

It is not surprising that the courts below would choose to ignore these uncontradicted facts. Both courts were laboring under a misapprehension regarding the necessity of a search warrant. Both courts seem to believe that because a search warrant *might* have been readily obtained to effectuate a seizure at an earlier time, the conditions otherwise justifying a seizure as incident to a valid arrest are either absent or of no force or effect.

The fact is that a search warrant for the automobile could not have been obtained prior to the time of respondent's arrest. When the police had finished their investigation which was the basis for the arrest warrant they had no knowledge of the whereabouts of respondent's automobile. The arrest warrant was issued in Delaware County, Ohio, the situs of the crime. A search warrant issued by the same court would have been invalid in Franklin County, Ohio where the arrest took place. Section 2933.21, Ohio Revised Code, provides that a judge may issue a search warrant within his jurisdiction as opposed to an arrest warrant which may be served in any

county in the state. Section 2941.36, Ohio Revised Code.

Actually the arresting officers did not know the whereabouts of the automobile until respondent produced the parking ticket therefore at 5:30 P.M. on the day in question. This parking ticket, by respondent's own representation under either his or the state's theory, was a claim check for the automobile that they wanted to seize as having been used in the commission of the offense for which respondent had been arrested. It was in plain view to the officers who just had arrested respondent pursuant to a valid arrest warrant. Respondent told them where the car was parked on a public parking lot. They knew that unless they seized the car that it could be removed and never found. Mr. Justice Stewart speaking for the majority opinion in *Coolidge v New Hampshire* supra at page 467-68 stated:

> "The "plain view" doctrine is not in conflict with the first objective because plain view does not occur until a search is in progress. In each case, this initial intrusion is justified by a warrant or by an exception such as "hot pursuit" or search incident to a lawful arrest, or by an extraneous valid reason for the officer's presence. And, given the initial intrusion, the seizure of an object in plain view is consistent with the second objective, since it does not convert the search into a general or exploratory one. As against the minor peril to Fourth Amendment protections, there is a major gain in effective law enforcement. Where, once an otherwise lawful search is in progress, the police inadvertently come upon a piece of evidence, it would often be a needless inconvenience, and sometimes dangerous—to the evidence or to the police themselves—to require them to ignore it until they have obtained a warrant particularly describing it."

At pages 469-471 he continued:

> "The second limitation is that the discovery of evidence in plain view must be inadvertent. The ration-

> ale of the exception to the warrant requirement, as just stated, is that a plain-view seizure will not turn an initially valid (and therefore limited) search into a "general" one, while the inconvenience of procuring a warrant to cover an inadvertent discovery is great. But where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different. The requirement of a warrant to seize imposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as "per se unreasonable" in the absence of "exigent circumstances."

At page 472 he concluded:

> "In the light of what has been said, it is apparent that the "plain view" exception cannot justify the police seizure of the Pontiac car in this case. The police had ample opportunity to obtain a valid warrant; they knew the automobile's exact description and location well in advance; they intended to seize it when they came upon Coolidge's property. And this is not a case involving contraband or stolen goods or objects dangerous in themselves."

The factual situation in our case differs materially from that in *Coolidge*. Unlike *Coolidge* there was no search in progress but the officers did inadvertantly come upon the claim check to the automobile they wanted as evidence. They were not converting a limited search into a general one. While they seized the claim check to the automobile they did not seize respondent's brief case which they believed might have contained incriminating evidence, and in spite of the finding of the courts below there were genuine exigent circumstances for seizing the claim check which was in fact tantamount to seizing the automobile.

Prior to the discovery of the whereabouts of the automobile the officers did not have an opportunity to pro-

cure a search warrant for it. Whereas they knew the automobile's exact description they did not know its location, and they had no expectation of finding it at the office of the attorney general although they did intend to seize it when they found it.

A study of a great number of cases has convinced this writer that the majority decision in *Coolidge* is not clearly understood by either state or federal courts. Not only was there a variation of interpretations of the meaning of the majority opinion, particularly concerning the necessity for a serach warrant, between the various circuit courts of appeal and district courts but there also is evidence of a divergence of opinion between the judges in the various courts of appeals. If this is so it is inconceivable that police officers, few of whom have any legal expertise, possibly can know what to do in any given circumstance. Where an object, which they know to be valuable evidence in a case which they are investigating comes into their view, must they place a guard on it until they can procure a search warrant? In this day of ever increasing crime the hesitancy of a police officer to take prompt action to seize and protect evidence could be fatal to the protection to which the public is entitled. Seldom would a prompt seizure of incriminating evidence interfere with the Fourth Amendment Rights of the innocent.

At the time the seizure in this case was made the officers were not aware of *Coolidge* which came later. If properly schooled they were familiar with *Cooper* and *Carroll*. Even *Chambers* was not available to them. They did know that it was not a *Preston* case for the reason that the evidence they sought was relevant to the crime for which they had arrested respondent. Mr. Justice Black, in his dissenting opinion, noted that *Coolidge* in-

troduced a new rule to enforce proper police conduct. At page 488-489 he stated:

> "The majority holds that evidence it views as improperly seized in violation of its ever changing concept of the Fourth Amendment is inadmissible. The majority treats the exclusionary rule as a judge-made rule of evidence designed and utilized to enforce the majority's own notions of proper police conduct. The Court today announces its new rules of police procedure in the name of the Fourth Amendment, then holds that evidence seized in violation of the new "guidelines" is automatically inadmissible at trial. The majority does not purport to rely in the Fifth Amendment to exclude the evidence in this case. Indeed, it could not. The majority prefers instead to rely in "changing times" and the Court's role as it sees it, as the administrator in charge of regulating the contacts of officials with citizens. The majority states that in the absence of a better means of regulation, it applies a court-created rule of evidence.
>
> I readily concede that there is much recent precedent for the majority's present announcement of yet another new set of police operating procedures. By invoking this rulemaking power found not in the words but somewhere in the "spirit" of the Fourth Amendment, the Court has expanded that Amendment beyond recognition. And each new step is justified as merely a logical extension of the step before."

While the police officer did not have the benefit of the *Coolidge* or *Chambers* decisions the courts below did. Yet they ignored the holding of this Court in *Chambers v Maroney supra*. As Mr. Justice Black stated at page 504:

> "Moreover, under our decision last Term in *Chambers v Maroney*, 399 US 42, 26 L Ed 2d 419, 90 S Ct 1975 (1970), the police were entitled not only to seize petitioner's car but also to search the car after

it had been taken to the police station. The police had probable cause to believe that the car had been used in the commission of the murder and that it contained evidence of the crime. Under *Carroll v United States*, 267 US 132, 69 L Ed 543, 45 S Ct 280, 39 ALR 790 (1925), and *Chambers v Maroney, supra*, such belief was sufficient justification for the seizure and the search of petitioner's automobile."

In *Coolidge* Mr. Justice White, in a thoroughly documented dissenting opinion stated:

"For Fourth Amendment purposes, the difference between a moving and movable vehicle is tenuous at best. It is a metaphysical distinction without roots in the commonsense standard of reasonableness governing search and seizure cases. Distinguishing the case before us from the Carroll-Chambers line of cases further enmeshes Fourth Amendment law in litigation breeding refinements having little relation to reality. I suggest that in the interest of coherence and credibility we either overrule our prior cases and treat automobiles precisely as we do houses or apply those cases to readily movable as well as moving vehicles and thus treat searches of automobiles are we do the arrest of a person. By either course we might bring some modicum of certainty to Fourth Amendment law and give the law enforcement officers some slight guidance in how they are to conduct themselves." *Coolidge v New Hampshire, supra*, at page 527.

In the interest of proper law enforcement and the protection of the public it is urged that the latter alternative be adopted. It is believed that this Court has embarked upon such a step in this direction in the recent case of *Cady v Dombrowski, supra*. Although the facts in *Cady* are not the same as those herein the majority of the court likened them to those in *Harris v United States*, supra and *Cooper v California*, supra. In *Harris* the petitioner had been arrested for robbery and his car

impounded as evidence. Here respondent was arrested for murder and his car impounded as evidence. In *Cooper* the petitioner was arrested for selling heroin and his car impounded pending forfeiture proceedings. In either *Harris* or *Cooper* the police could have gotten a search warrant. In summing up the basis for holding the search to be valid Mr. Justice Rehnquist stated:

> "The Court's previous recognition of the distinction between motor vehicles and dwelling places leads us to conclude that the type of caretaking "search" conducted here of a vehicle that was neither in the custody nor on the premises of its owner, and that had been placed where it was by virtue of lawful police action, was not unreasonable solely because a warrant had not been obtained. The Framers of the Fourth Amendment have given us only the general standard of "unreasonableness" as a guide in determing whether searches and seizures meet the standard of that Amendment in those cases where a warrant is not required. Very little that has been said in our previous decision, see *Cooper, supra, Harris, supra, Chambers, supra,* and very little that we might say here can usefully refine the language of the Amendment itself in order to evolve some detailed formula for judging cases such as this. Where, as here, the trunk of an automobile, which the officer reasonably believed to contain a gun, was vulnerable to intrusion by vandals, we hold that the search was not "unreasonable" within the meaning of the Fourth and Fourteenth Amendments." *Cady v Dombrowski,* 37 L Ed 2d at page 718.

Here the automobile was parked on a public parking lot. It was not in respondent's home or on his property. It could be readily moved. Had the officers not impounded it they would have run the risk of losing valuable evidence believed by them to be such. Had the car been moved and concealed pending their procuring a search

warrant they could have been found derelict in their duty for letting the evidence disappear.

Any intrusion into respondent's automobile was a very limited one. Paint samples were taken and tire casts were made. This appears to be a far less intrusion than that of taking a sample of scrapings from the fingernails of a strangulation-murder suspect, over his protest and without a warrant. In *Cupp v Murphy*, —— US —— 35 L Ed 2d 900 this Court held at page 906:

> "On the facts of this case, considering the existence of probable cause, the very limited intrusion undertaken incident to the station house detention, and the ready destructibility of the evidence, we cannot say that this search violated the Fourth and Fourteenth Amendments."

Petitioner believes that there was no Fourth and Fourteenth Amendment violation here.

CONCLUSION

Petitioner feels that the courts below have improperly gauged the impact of *Coolidge v New Hampshire, supra,* in the process of invalidating the seizure of respondent's automobile. While on the surface the case seems to be factually in point with the instant situation, and while the state has, in all the cases, attempted to justify the search for a number of similar reasons, there are significant factors which are not present in the instant case, and which make the instant seizure allowable. In *Coolidge* an individual's private property was entered and his automobile taken therefrom. In *Coolidge* his automoble was where there was no prospect that it was about to be moved. Petitioner would not contest if respondent's car had been seized from his private property and there were no real prospects of the car being moved.

In the instant situation, the intrusion into respondent's control over his car was not dependent upon an invasion of his physical premises. The car itself was seized from a public parking lot, upon which police needed no specific authorization to enter.

In *Coolidge* there was no significant prospect of the car in question being moved while in the instant situation such was actually a certainty. While the authorities in our case had information relating to the car, prior to the seizure, there is no indication such information amounted to probable cause to obtain a warrant. Nor can it be said that on the morning of the interrogation it was reasonable to procure a warrant considering the mobile nature of the item to be seized and the uncertainty of its location at any particular time. Petitioner believes rather, that this decision in *Cady v Dombrowski, supra,* should govern this case.

Accordingly, petitioner submits that the admission of the paint scrapings in question were admitted at respondent's trial without violating his rights under the Fourth and Fourteenth Amendments to the Constitution. A finding to the contrary by the courts below and the granting of the Writ of Habeas Corpus were conclusions clearly erroneous.

Lastly petitioner iterates that the question of the legality of the seizure of the paint samples was, after a motion to suppress and *voir dire* hearing, determined by the trial court. The question was raised by respondent and rejected by two Ohio appellate courts and this Court. Petitioner believes that the district court was in error in relitigating the matter. As enunciated by Mr. Justice Powell in his concurring opinion:

> "Where there is no constitutional claim bearing on innocence, the inquiry of the federal court on habeas review of a state prisoner's Fourth Amendment claim should be confined solely to the question whether the defendant was provided a fair opportunity in the state courts to raise and have adjudicated the Fourth Amendment claim. Limiting the scope of habeas review in this manner would reduce the role of the federal courts in determining the merits of constitutional claims with no relation to a petitioner's innocence and contribute to the restoration of recently neglected values to their proper place in our criminal justice system." *Schneckloth v Bustamonte*, —— US ____ 36 L Ed 2d 854, 855 (1973).

Respectfully submitted,
WILLIAM J. BROWN
Attorney General of the State of Ohio
LEO J. CONWAY
NICHOLAS R. CURCI
Assistant Attorneys General
JEFFREY L. MCCLELLAND
Attorney for Petitioner